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Criminal Procedure

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Criminal Procedure

Criminal Procedure; diminished capacity, mental disease, voluntary intoxication

Penal Code §§28, 29 (new); §§21, 22, 26, 188, 189 (amended).
SB 54 (Roberti); STATS. 1981, Ch 404

Chapter 404 eliminates the judicial defense of diminshed capacity[1] and changes the permissible use of evidence[2] and expert testimony relating to mental disease[3] and voluntary intoxication.[4] Additionally, Chapter 404 alters certain definitions pertaining to murder[5] and the general definition of intent.[6]

The California Supreme Court developed the defense of diminished capacity[7] in response to a perceived injustice in the strict application of the insanity defense.[8] This defense was maintained by a showing that the defendant lacked the capacity to form the specific intent required for certain crimes[9] because of a mental defect, disease, or other abnormality.[10] A finding of diminished capacity would result in a verdict of not guilty of the crime charged.[11] The defendant could be convicted on a charge of a lesser crime that did not require specific intent, but absent the applicability of a lesser crime the defendant would go free.[12] Chapter 404 declares that as a matter of public policy there will be no defense of diminished capacity,[13] irresistible impulse,[14] or diminished

1. *See* CAL. PENAL CODE §28(b). *Compare* People v. Cruz, 26 Cal. 3d 233, 605 P.2d 830, 162 Cal. Rptr. 1 (1980) *and* People v. Wells, 33 Cal. 2d 330, 202 P.2d 53 (1949) *with* CAL. PENAL CODE §28(b).
2. *See* CAL. PENAL CODE §28(a).
3. *See id.* §29.
4. *See id.* §22.
5. *See id.* §§188, 189.
6. *See id.* §21.
7. *See generally* 26 Cal. 3d 233, 605 P.2d 830, 162 Cal. Rptr. 1 (1980); 33 Cal. 2d 330, 202 P.2d 53 (1949). *See also* People v. Poddar, 10 Cal. 3d 750, 757, 518 P.2d 342, 347, 111 Cal. Rptr. 910, 915 (1974) (evidence of diminished capacity may negate existence of a specific mental state).
8. *See* CAL. PENAL CODE §§1016, 1026.
9. *See generally id.* §§187-199 (homicide).
10. *See generally* People v. Conley, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966); People v. Wells, 33 Cal. 2d 330, 202 P.2d 53 (1949).
11. *See generally* People v. Conley, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966).
12. *See id.* at 310, 411 P.2d at 911, 49 Cal. Rptr. at 815.
13. *See id.* 411 P.2d at 911, 49 Cal. Rptr. at 815.
14. *See generally* People v. Cantrell, 8 Cal. 3d 672, 504 P.2d 1256, 105 Cal. Rptr. 792 (1973). *See also* CALJIC No. 4.05 (insanity—"irresistible impulse").

responsibility.[15] Evidence of mental disease, defect, or disorder may not be used to negate the *capacity* of the defendant to form purpose, intent, knowledge, malice aforethought, or other mental state.[16] This evidence may be used, however, to prove that the defendant *did not in fact* form the required mental state.[17] Chapter 404 also prohibits the use of expert testimony regarding the defendant's mental illness, disorder, or defect[18] in the guilt phase of a criminal trial to show that the defendant did not have the mental state required for the crime.[19] Chapter 404 specifies that the question of whether the defendant had the required mental state is to be decided by the trier of fact.[20] On the question of whether the Legislature may completely prohibit the use of this evidence the California Supreme Court has held that "we do not perceive how a defendant who has in his possession evidence which rebuts an element of the crime can logically be denied the right to present that evidence merely because it will result in his acquittal,"[21] and that "not allowing the defendant to disprove mental state would constitute an invalid interference with the trial process."[22] Chapter 404 apparently does not challenge these requirements directly because while it prohibits the defendant from proving lack of *capacity* to form the specific intent, it allows the defendant to show that *in fact* he or she did not form that intent.[23] Thus, the question remains whether diminished capacity as a defense actually has been eliminated completely.

Prior law required that evidence of voluntary intoxication could not be considered by the jury unless the intoxication actually affected the existence of any specific requirement including purpose, motive, and intent.[24] Under Chapter 404, an act is no less criminal because of that person's voluntary intoxication.[25] Chapter 404 specifically provides that capacity to form any mental state is not negated by evidence of

15. CAL. PENAL CODE §28(b).
16. *Id.* §28(a). *See also id.* §28(c) (this section does not affect insanity hearing pursuant to California Penal Code Sections 1026, 1429.5).
17. *See id.* §28(a).
18. *Id.* §29. *See generally* Berman & Hunt, *Criminal Law and Psychiatry: The Soviet Solution*, 2 STAN. L. REV. 635 (1950).
19. CAL. PENAL CODE §29.
20. *Id.*
21. People v. Wetmore, 22 Cal. 3d 318, 328, 583 P.2d 1303, 1315, 149 Cal. Rptr. 265, 272 (1978).
22. People v. Wells, 33 Cal. 2d 330, 346, 202 P.2d 53, 63 (1949). *See also In re* Winship, 397 U.S. 358, 364 (1970) (the United States Supreme Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").
23. *Compare* People v. Cruz, 26 Cal. 3d 233, 605 P.2d 830, 162 Cal. Rptr. 1 (1980) *and* 33 Cal. 2d 330, 202 P.2d 53 (1949) *with* CAL. PENAL CODE §28(b).
24. *See* CAL. STATS. 1850, c. 99, §8, at 230 (enacting CAL. PENAL CODE §22). *See generally* People v. Conley, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966).
25. CAL. PENAL CODE §22(a).

voluntary intoxication.[26] When the actual existence of any mental state is a necessary element of the offense, however, evidence of voluntary intoxication is admissible to show that the defendant did not in fact form the required mental state.[27] Chapter 404 also expands the definition of voluntary intoxication to include ingestion or injection of any intoxicating drug or other substance.[28]

Prior to Chapter 404 intent of the defendant was manifested by the circumstances connected with the offense and the defendant's sound mind and discretion.[29] In addition, persons of sound mind were defined as all who were not idiots, lunatics, or affected with insanity.[30] Under Chapter 404, intent is manifested only by the circumstances connected to the offense.[31] In addition, Chapter 404 eliminates lunatics and insane persons from the list of persons not capable of committing crimes,[32] apparently to remove the issue of sanity from the guilt phase of a trial.[33]

The California Supreme Court in *People v. Wolff*[34] established that to prove a killing was deliberate and premeditated as required for first degree murder, the prosecution must establish that the defendant maturely and meaningfully reflected upon the gravity of the act.[35] Chapter 404 specifically provides that this showing is not necessary to prove first degree murder.[36] Existing law states that malice required for a murder conviction[37] may be expressed or implied.[38] Express malice is established by a manifestation of a deliberate intention to take unlawfully the life of a fellow creature.[39] Implied malice is established when there is no considerable provocation or the circumstances surrounding the killing show an abandoned and malignant heart.[40] In *People v. Conley*[41] the California Supreme Court held that in addition to express or implied malice there also must be an awareness of the obligation to

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26. *See id.*
27. *See id.* §22(b).
28. *Compare id.* §22(c) *with* CAL. STATS. 1850, c. 99, §8, at 230.
29. *See* CAL. STATS. 1850, c. 99, §8, at 230.
30. *See id.*
31. CAL. PENAL CODE §21.
32. *Compare id.* §26 *with* CAL. STATS. 1976, c. 1181, §1, at 5285 (enacting CAL. PENAL CODE §26).
33. Telephone interview with Jeniffer Moss, Revision of the Penal Code Committee (Sept. 22, 1981) (notes on file at the *Pacific Law Journal*).
34. 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).
35. *Id.* at 821, 394 P.2d at 975, 40 Cal. Rptr. at 287.
36. CAL. PENAL CODE §189.
37. *See generally id.* §§187, 188 (homicide).
38. *Id.* §188.
39. *Id.*
40. *Id.*
41. 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966).

act within the general body of laws regulating society.[42] Chapter 404 negates this holding by providing that this is not part of the definition of malice and that no other mental state must be established other than that required by existing law.[43]

42. *See* 64 Cal. 2d at 322, 411 P.2d at 918, 49 Cal. Rptr. at 822.
43. *Compare* CAL. PENAL CODE §188 *with* 64 Cal. 2d at 322, 411 P.2d at 918, 49 Cal. Rptr. at 822.

Criminal Procedure; examination and investigation of mental status

Penal Code §1027 (amended).
SB 590 (Rains); STATS. 1981, Ch 787
Support: California State Psychology Association
Opposition: California Attorneys for Criminal Justice; State Public Defender

Chapter 787 was enacted to ensure that courts have discretionary power to determine the admissibility of psychiatric evidence.[1] Existing law specifies that when a defendant enters a plea of not guilty by reason of insanity[2] the court must appoint two and may appoint three psychiatric experts.[3] Prior law required the appointed experts to conduct an investigation of the defendant's *sanity*.[4] Chapter 787 directs these experts instead to examine the defendant and investigate his or her *mental status*.[5] Furthermore, while the appointment of the experts continues to carry the duty to testify whenever summoned in any proceeding when the defendant's sanity is in question,[6] Chapter 787 specifies the matters that must be included in the testimony.[7] Specifically, Chapter 787 provides that the testimony of the psychiatric experts must include, but is not limited to: (1) the defendant's psychological history, (2) the

1. *See generally* Joint Committee for Revision of the Penal Code, Press Release, *Rains' Bill to Curb Abuse of Psychiatric Testimony*, Sept. 10, 1981 (copy on file at the *Pacific Law Journal*).
2. *See* CAL. PENAL CODE §1027. *See generally* Berman & Hunt, *Criminal Law and Psychiatry: The Soviet Solution*, 2 STAN. L. REV. 635 (1950).
3. CAL. PENAL CODE §1027(a) (psychiatric expert must be a psychiatrist or licensed psychologist with a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders).
4. *See* CAL. STATS. 1978, c. 391, §2, at 1242 (amending CAL. PENAL CODE §1027).
5. CAL. PENAL CODE §1027. *See* Lewis, 12 COURTROOM MEDICINE §7.30 (mental status examinations).
6. *Compare* CAL. PENAL CODE §1027 *with* CAL. STATS. 1978, c. 391, §2, at 1242.
7. CAL. PENAL CODE §1027(a). *See also id.* (allowing these court appointed experts, in addition to travel expenses, fees that seem just and reasonable to the court; this expense will be paid by the county where the trial is held).

facts surrounding the commission of the acts underlying the offense charged that were used by the expert in his or her examination, and (3) any present psychological or psychiatric symptoms of the defendant.[8]

Many psychiatric experts are questioning whether they can determine reliably that the defendant was insane at the time of the crime by post-arrest examinations.[9] Thus, Chapter 787 declares that the statutory provision for the examination and investigation of the mental status of the defendant by appointed experts does not presume that the experts can determine whether the defendant was sane or insane at the time of the offense.[10] Accordingly, the court is expressly granted discretion to admit or exclude any psychiatric or psychological evidence regarding the defendant's state of mind or mental or emotional condition at the time of the offense.[11]

8. *See id.* §1027(b).
9. *See generally* Joint Committee for Revision of the Penal Code, Press Release, *Rains' Bill to Curb Abuse of Psychiatric Testimony*, Sept. 10, 1981 (copy on file at the *Pacific Law Journal*).
10. *See* CAL. PENAL CODE §1027(c).
11. *Id.* (pursuant to the California Evidence Code).

Criminal Procedure; incompetent defendants

Penal Code §1372 (amended).
SB 1015 (Sieroty); STATS. 1981, Ch 611
Support: Department of Mental Health

Under existing law, when a defendant who was determined to be incompetent to be tried or adjudged to punishment[1] regains competency,[2] the county mental health director, the regional center director (hereinafter referred to as the director), the medical director of the facility where the defendant is committed, or the defendant's conservator will certify this fact to the court where the original determination of incompetency was made.[3] The court will then hold a hearing to determine if the defendant should be released on his or her own recognizance or if bail should be set pending conclusion of the proceedings.[4] Prior to the enactment of Chapter 611, the defendant was sent to jail if

1. *See generally* CAL. PENAL CODE §§1367-1375.5 (inquiry into the competence of the defendant before trial or after conviction); *see also id.* §1201 (pronouncement of judgment after recovery).
2. *See id.* §1374.
3. *Id.* §1372(a), (b). *See id.* §1372(b) (the conservator must also certify the fact of regained competency to the county sheriff and district attorney and the defendant's attorney of record).
4. *See id.* §1372(d).

the court determined that neither alternative was appropriate.[5] Upon the recommendation of the director of the defendant's treatment facility, Chapter 611 allows the court, within its discretion, to have the defendant instead returned to the original facility or a secure facility approved by the director.[6] The recommendation must be based on the director's opinion that there is a substantial risk that a jail environment would return the defendant to a state of incompetency or that the defendant will need continued treatment in the recommended facility to maintain competency.[7]

5. *See id.*
6. *Id.* §1372(e).
7. *Id.*

Criminal Procedure; dismissal of charges, recordation of reasons for disposition

Penal Code §§859c, 1192.6 (new); §§859b, 861, 1192.5, 1387 (amended).
AB 632 (Papan); STATS. 1981, Ch 759
AB 754 (Cramer); STATS. 1981, Ch 854
Support: California Highway Patrol; Department of Finance

A magistrate must dismiss a criminal complaint if the defendant has not pleaded guilty and has remained in custody for ten or more court days and the preliminary examination is set or continued beyond ten court days from the date of the arraignment or plea.[1] This dismissal, however, will not occur if the defendant personally waives the right to a preliminary examination within the ten-court-day period or if the prosecution establishes good cause[2] for a continuance beyond the period.[3] Furthermore, if the preliminary examination is set or continued beyond the ten-court-day period, release on the defendant's own recognizance[4] is required unless the defendant is charged with a capital offense in a cause "where proof is evident and the presumption is great."[5] Chapter

1. *See* CAL. PENAL CODE §859b. *See generally* 12 PAC. L.J., REVIEW OF SELECTED 1980 CALIFORNIA LEGISLATION 334-39 (1981).
2. *See* Blake v. Superior Court, 108 Cal. App. 3d 244, 248, 166 Cal. Rptr. 470, 472 (1980) (discussing the good cause provision).
3. CAL. PENAL CODE §859b.
4. *See id.* §1318 (description of release on defendant's own recognizance).
5. *Id.* §§859b, 861(b). This provision paraphrases the California constitutional requirements regarding the release of a criminal defendant on bail. CAL. CONST., art. I, §12. An indictment for a capital offense itself furnishes a presumption of guilt too great to entitle the defendant to bail as a matter of right. People v. Tinder, 19 Cal. 539 (1862). It is not necessary that the

854 additionally prohibits the defendant's release if the continuance beyond the ten-court-day period results from (1) the defendant's request for a continuance of the preliminary examination beyond the ten-court-day period,[6] (2) unavailability of a necessary witness due to actions of the defendant,[7] (3) illness of counsel,[8] (4) counsel being unexpectedly engaged in a jury trial,[9] or (5) unforeseen conflicts of interest requiring appointment of new counsel.[10] Furthermore, Chapter 854 permits the magistrate to deny release on the defendant's own recognizance if the offense charged is a violent felony[11] and the continuance is requested for a reason not attributable to the fault of the prosecution.[12] This provision shall become operative only if Senate Constitutional Amendment No. 10 of the 1981-82 Regular Session of the Legislature is adopted by the people.

Existing law requires that unless preliminary examinations are conducted in one session, the complaint must be dismissed except in cases when the magistrate postpones the preliminary examination for good cause.[13] The postponement, however, must not be for more than ten court days absent a personal waiver by the defendant of the right to a continuous preliminary examination or the establishment of good cause by the prosecution for a postponement beyond the ten-court-day period.[14] Chapter 854 requires that the defendant be released on his or her own recognizance[15] if the preliminary examination is postponed beyond the ten-court-day period.[16] In addition, Chapter 854 allows the magistrate to interrupt the preliminary examination to conduct brief court matters without being required to release the defendant, provided that a substantial majority of the court's time is devoted to the preliminary examination.[17]

Finally, Chapter 854 adds the following two exceptions to the ex-

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evidence be so convincing to justify a verdict; it is sufficient if it induces a belief that the defendant has committed the crime. *In re* Page, 82 Cal. App. 576, 578 (1927), *Ex Parte* Walpole, 85 Cal. 362, 368 (1890).

6. CAL. PENAL CODE §§859b, 861(b).
7. *See id.* §859b(b)(3).
8. *Id.* §859b(b)(4).
9. *Id.* §859b(b)(5).
10. *Id.* §859b(b)(6).
11. *See id.* §677.5(c) (violent felonies defined for purposes of this section).
12. *See id.* §859c; CAL. STATS. 1981, c. 854, §5, at —.
13. CAL. PENAL CODE §861.
14. *See id.*
15. *Id.* §861(b) (this required release is subject, however, to the exceptions provided in California Penal Code Section 859(b)).
16. *Id.*
17. *See id.* §861.

isting requirement that a second order terminating an action[18] is a bar to subsequent prosecution for the same offense: (1) when a showing is made that good cause existed for the delay of the preliminary examination beyond sixty days from the date of the arraignment or plea[19] or (2) if the motion[20] to extend the preliminary examination beyond the ten-court-day period was granted because of the present insanity of the defendant or the lack of counsel after the defendant elected to conduct his or her own defense.[21]

Although existing law requires a statement of reasons to be entered on the record when the judge orders a dismissal of an action, prior to the enactment of Chapter 759, the prosecutor was not required to state the reasons for seeking the dismissal of the original charges.[22] Chapter 759 requires that in every felony case the prosecuting attorney must state in open court the reasons for seeking a dismissal.[23] In addition, when the prosecuting attorney makes recommendations to the court regarding what punishment to impose or whether the court should exercise any legal powers available to it upon a plea of guilty or nolo contendere to a felony charge, the specific reasons for these recommendations must be stated in open court and made a part of the court file.[24] This provision was enacted to prevent plea bargains from continuing to be the semi-private dealing between the prosecutor and the defense attorney that is a primary source of the public's disillusion with the criminal justice system.[25] Finally, Chapter 759 requires the court record to contain the reasons for any amendment to dismissal of charges contained in an original felony accusatory pleading.[26]

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18. *Id.* §1387 (termination must be pursuant to California Penal Code Sections 859a, 861, 871, or 995).
19. *See id.* §1387(a).
20. *Id.* §1387(b) (motion must be made pursuant to California Penal Code Section 995).
21. *Compare id.* §1387 *with* CAL. STATS. 1980, c. 938, §8, at —.
22. *See* CAL. PENAL CODE §1385.
23. *See id.* §1192.6(b).
24. *See id.* §1192.6(c).
25. See Assemblyman Louis J. Papan, Press Release, February 24, 1981.
26. *See* CAL. PENAL CODE §1192.6(a).

Criminal Procedure; exclusion of evidence—sexual conduct of victim

Evidence Code §§782, 1103 (amended).
SB 23 (Watson); STATS. 1981, Ch 726

Support: Attorney General; California District Attorneys Association
Opposition: California Attorneys for Criminal Justice; State Public Defender

Under existing law, evidence of the character or a trait of character in the form of opinion evidence,[1] reputation evidence,[2] and evidence concerning the complaining witness'[3] sexual conduct are inadmissible for proving the victim's consent in prosecutions of rape-related crimes.[4] With the enactment of Chapter 726, opinion evidence, reputation evidence, and evidence concerning the complaining witness' sexual conduct are also inadmissible for the purpose of proving the victim's consent in prosecutions of crimes related to sodomy,[5] oral copulation,[6] or the penetration of genital or anal openings by a foreign object.[7] Evidence of the sexual conduct of a complaining witness is *still* admissible, however, to show sexual conduct between the complaining witness and the defendant,[8] to rebut evidence of sexual conduct introduced by the prosecution,[9] or to attack the credibility of the complaining witness.[10]

COMMENT

Statutes that restrict the admission of evidence of a victim's sexual activity to prove the victim's consent in sex-related crimes have been challenged as a violation of a defendant's constitutional right to a fair trial, guaranteed by the sixth and fourteenth amendments.[11] The challenge is based on the argument that the mandatory prohibition of this evidence deprives defendants of the right to a fair opportunity of de-

1. 31 CAL. JUR. 3d *Evidence* §484 (1976) (definition of opinion evidence).
2. *See id.* §§206, 306 (definition of reputation evidence).
3. *See* CAL. EVID. CODE §§782(b), 1103(b)(5) (definition of complaining witness).
4. *Id.* §1103(b)(1).
5. *See* CAL. PENAL CODE §286(a) (definition of sodomy).
6. *See id.* §288a(a) (definition of oral copulation).
7. *See id.* §289(b) (no part of the body can be considered a foreign object). *Compare* CAL. EVID. CODE §1103(b)(1) *with* CAL. STATS. 1974, c. 569, §2, at 1388 (if the specified sex crime was alleged to have occurred in a local detention facility or in a state prison, evidence of the complaining witness' prior sexual conduct is admissible for the purpose of proving the victim's consent).
8. *Compare* CAL. EVID. CODE §1103(b) *with* CAL. STATS. 1974, c. 569, §2, at 1388.
9. CAL. EVID. CODE §1103(b)(3).
10. *Id.* §§782(a), 1103(b)(4).
11. U.S. CONST. amend. VI; amend. XIV, §1; CAL. CONST. art. 1, §7(a). *See* Tanford & Bocchino, *Rape Victim Shield Laws And The Sixth Amendment*, 128 U. PA. L. REV. 544, 545, (1980) [hereinafter cited as Tanford & Bocchino]; Comment, *A Due Process Challenge To Restrictions On The Substantive Use Of Evidence Of A Rape Prosecutrix's Prior Sexual Conduct*, 9 U.C.D. L. REV. 443, 445-46 (1976) [hereinafter cited as *A Due Process Challenge*].

fense,[12] as provided in the sixth amendment.[13] The constitutionality of statutes that restrict the admissibility of evidence of a victim's sexual conduct to prove the victim's consent in sex-related crimes, however, has been upheld by California courts.[14]

As an alternative to mandatory exclusion, recent commentary has suggested that evidence concerning a victim's sexual conduct, offered to show the victim's consent, should be determined to be either admissible or inadmissible in the discretion of the court only after it balances the defendant's need for the evidence with the state's interest in excluding it.[15] This would preserve the defendant's sixth amendment right to a fair opportunity of defense by allowing the admission of evidence of the victim's sexual conduct when its probative value outweighs the state's interest for exclusion.[16]

12. *See A Due Process Challenge, supra* note 11, at 456 (a fair opportunity to defend includes the right to confront and cross-examine the witness, and to offer evidence in defense).
13. *See* Tanford and Bocchino, *supra* note 11, at 555-60.
14. *See* People v. Guthreau, 102 Cal. App. 3d 436, 444, 162 Cal. Rptr. 376 (1980); People v. Blackburn, 56 Cal. App. 3d 685, 691, 128 Cal. Rptr. 864, 867 (1976).
15. *See* Tanford and Bocchino, *supra* note 11, at 565-66; *A Due Process Challenge, supra* note 11, at 473-74. *See generally* CAL. EVID. CODE §352.
16. *See* Tanford and Bocchino, *supra* note 11, at 565-66; *A Due Process Challenge, supra* note 11, at 473-74.

Criminal Procedure; statute of limitations for felonies

Penal Code §800 (amended).
SB 311 (Holmdahl); STATS. 1981, Ch 1017

Chapter 1017 extends the statute of limitations for rape and related offenses, and felony welfare fraud.[1] Chapter 1017 further provides that the statute of limitations for any felony is now satisfied or tolled, by the issuance of an arrest warrant.[2]

Crimes Excepted from the General Felony Statute of Limitations

Prior to the enactment of Chapter 1017, the statute of limitations for rape, rape in concert with another person, sodomy, or penetration of anal or genital openings with a foreign object against the victim's will was three years and lewd and lascivious acts upon the body of a child

1. *See* CAL. PENAL CODE §800.
2. *Compare id. with* CAL. STATS. 1980, c. 1307, §2, at — (amending CAL. PENAL CODE §800).

under fourteen was five years.[3] Thus, the state lost the ability to prosecute a suspected offender if an indictment or information was not timely filed.[4]

Chapters 895, 901 and 909 extend the statute of limitations for the specified crimes to six years.[5] Chapter 1017 was enacted in part, in response to the growing incidence of rape perpetrated by repeat offenders over a period exceeding three years.[6]

Prior to the enactment of Chapter 1017, the statute of limitations for felony welfare fraud was three years from the date of *commission*.[7] In *Gasaway v. Superior Court*,[8] the State contended that welfare fraud should be included in the definition of grand theft, and thus be excepted from the three year statute of limitations provided in the Penal Code.[9] The statute of limitations for grand theft does not begin to run until three years after the *discovery* of the commission of those crimes.[10] The court strictly interpreted the Code, however, stating that it was for the Legislature to add enumerated exceptions to the general statute of limitations for felonies.[11] By specifically exempting felony welfare fraud from the general statute, Chapter 1017 authorizes the court to treat felony welfare fraud in the same manner as embezzlement of public money and grand theft.[12]

Tolling and Satisfying the Statute

Prior law provided that the general statute of limitations for felonies was satisfied by the filing of an information or the certification of a case to the superior court within three years after the commisison or the discovery of a crime.[13] Chapter 1017 specifies that the general statute of limitations for felonies is now satisfied or tolled by the issuance of an arrest warrant or the finding of an indictment after the commission[14] or the discovery[15] of a crime.[16] Chapter 1017 also provides that a pending

3. *See* CAL. STATS. 1980, c. 1307, §2, at —. *See also* 13 PAC. L.J., REVIEW OF SELECTED 1982 CALIFORNIA LEGISLATION 634 (1982).
4. *See* CAL. STATS. 1980, c. 1307, §2, at —.
5. *See* CAL. PENAL CODE §800(b).
6. *See generally* Assemblyman Byron D. Sher, News, June 30, 1981 (copy on file at the *Pacific Law Journal*).
7. *See* CAL. STATS. 1980, c. 1307, §2, at —. *See also* 2 B. WITKIN, CALIFORNIA CRIMES *Crimes Against Governmental Authority* §896(h) (Supp. 1978).
8. 70 Cal. App. 3d 545, 139 Cal. Rptr. 27 (1977).
9. *See id.* at 549, 139 Cal. Rptr. at 28.
10. *See* CAL. PENAL CODE §800(c).
11. *See* 70 Cal. App. 3d at 551, 139 Cal. Rptr. at 29.
12. *See* CAL. PENAL CODE §800(c).
13. *See* CAL. STATS. 1980, c. 1307, §2, at —.
14. *See* CAL. PENAL CODE §800(a), (b).
15. *See id.* §800(c).
16. *See id.* §802.5.

criminal action tolls the statute of limitations for the purposes of recommencing a criminal action in the event the first action is dismissed subject to the provisions of the Penal Code.[17]

Chapter 1017 is an apparent effort to reconcile statutory law with the recent California Supreme Court decision in *Hawkins v. Superior Court*.[18] In *Hawkins*, the Court held that accused persons are denied equal protection of law guaranteed by the California Constitution[19] when they are prosecuted by indictment, thus depriving them of a preliminary hearing and its concomitant rights.[20] *Hawkins* requires a postindictment preliminary hearing if the defendant requests.[21] A postindictment hearing, however, may involve the same witnesses and the same case that the district attorney presented at the indictment; an expensive and duplicative effort.[22] Allowing the statute of limitations to be satisfied by the issuance of an arrest warrant eliminates the need for an indictment to satisfy or toll the statute.[23] Chapter 1017 retains indictment as an alternative method for satisfying or tolling the statute.[24] *Hawkins*, however, still requires a postindictment preliminary hearing in this situation.[25]

Chapter 1017 specifically expresses the intent of the Legislature that the issuance of an arrest warrant to toll or satisfy the statute of limitations will continue[26] only until a decision of a court of appeal, the California Supreme Court, or an amendment to the Constitution provides that a person charged by indictment is not entitled to a preliminary hearing.[27] Upon that occurrence, Chapter 1017 specifies that the statute of limitations will be satisfied or tolled by an information filed with, or a case certified to, the superior court within the appropriate time period.[28]

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17. *See id.*

18. *See* 22 Cal. 3d 584, 150 Cal. Rptr. 435 (1978). *See generally* 52 TEMP. L.Q. 1175 (1979); 13 SUFFOLK L. REV. 1482 (1979).

19. CAL. CONST. art. I, §14 (felonies must be prosecuted as provided by law either by indictment or after examination and commitment by a magistrate by information).

20. *See* United States v. Shober, 489 F. Supp. 393, 401 (1979) (explicating the holding in Hawkins v. Superior Court).

21. *See* 22 Cal. 3d at 594, 150 Cal. Rptr. at 441.

22. *See* conversation with Steven White, California District Attorneys Association (notes on file at the *Pacific Law Journal*).

23. *See* CAL. PENAL CODE §800. *See also* conversation with Steven White, California District Attorneys Association (notes on file at the *Pacific Law Journal*).

24. *See* CAL. PENAL CODE §800.

25. *See* Hawkins v. Superior Court, 22 Cal. 3d 584, 150 Cal. Rptr. 435.

26. *See* CAL. PENAL CODE §800.

27. *See* CAL. STATS. 1981, c. 1017, §4, at — (amending Cal. Penal Code §800). *Compare* CAL. STATS. 1981 c. 1017, §1, at — *with id.* §2, at —.

28. *Compare* CAL. STATS. 1981 c. 1017, §2, at — *with* CAL. STATS. 1980, c. 1207, §2, at —.

Criminal Procedure; juvenile parole hearings

Welfare and Institutions Code §§1767, 1767.1 (new).
AB 13 (Moorehead); STATS. 1981, Ch 591
Support: Attorney General; California Peace Officers Association; Department of Finance; Youth Authority
Opposition: California Attorneys for Criminal Justice; California State Public Defender
AB 1401 (Baker); STATS. 1981, Ch 645
Support: California Peace Officers Association; Department of Finance; Youth Authority
Opposition: California Attorneys for Criminal Justice; California State Public Defender

Existing law enables the Youthful Offender Parole Board (hereinafter referred to as the Board) to conduct hearings to consider and review parole of offenders committed to the Youth Authority.[1] In order to ensure public input into Board decisions,[2] Chapter 591 requires that written notice of the scheduled hearing be given to (1) the judge of the court that committed the person to the Youth Authority, (2) the attorney for the person, (3) the district attorney of the county from which the person was committed, (4) the law enforcement agency that investigated the case, and (5) the victim of the offense or his or her next of kin if notice has been requested.[3] Notice must be given at least thirty days before the Board meets for parole review.[4] Persons receiving notice may not attend the parole hearings[5] but may submit written statements to the Board at least ten days prior to the scheduled hearing for the Board's consideration at the hearing.[6] Chapter 591 requires the presiding officer at the hearing to state findings and supporting reasons for the Board's decisions.[7] The statement must be reduced to writing and made available to the public for inspection no later than thirty days

1. *See generally* CAL. WELF. & INST. CODE §§1731.5, 1766 (the person convicted of a crime may not be committed to the Youth Authority if his or her sentence is death, life imprisonment, a fine only, or less than 90 days imprisonment).
2. *See* CAL. STATS. 1981, c. 591, §2, at —. *See also* Assemblywoman Jean M. Moorehead, Press Release, *Moorehead Calls for Open Parole Hearings*, Dec. 2, 1980 (copy on file at the *Pacific Law Journal*).
3. *See* CAL. WELF. & INST. CODE §1767. *See also id.* §707(b) (designating specific violent offenses subject to parole consideration).
4. *See id.* §1767 (the burden is on the requesting party to keep the Board informed of his or her current mailing address).
5. *See id.*
6. *See id.*
7. *See id.*

after the hearing.[8] In addition, Chapter 645 requires similar notification[9] for parole consideration of offenders *under* the age of 18,[10] but does not require public inspection of either Board decisions or the basis for the decisions.[11]

8. *See id.*
9. *See id.* §1767.1.
10. *See id.*
11. *Compare id. with id.* §1767.

Criminal Procedure; preliminary examinations

Penal Code §872 (amended).
AB 1016 (McCarthy); STATS. 1981, Ch 1026
Opposition: California Trial Lawyers Association

Existing law requires a preliminary examination of a felony criminal case to which a defendant has not plead guilty by a magistrate to determine if there is sufficient cause[1] to require the defendant to answer.[2] Chapter 1026 specifically authorizes hearsay evidence,[3] consisting of written statements of the testimony of witnesses made under the penalty of perjury, to be used in this preliminary examination in lieu of testimony.[4] A prosecuting attorney wishing to introduce a written statement at the examination must file the statement with the court and provide the defendant with copies either at the defendant's arraignment or at least ten days prior to the date set for the preliminary examination.[5] The written statements will not be considered as evidence at the preliminary examination, however, if (1) the prosecuting attorney does not comply with the filing and notice requirements, (2) the witness is a victim of a crime against his or her person, or (3) the testimony of the witness includes eyewitness[6] identification of the defendant.[7]

1. *See* People v. Upton, 257 Cal. App. 2d 677, 685, 65 Cal. Rptr. 103, 109 (1968); BLACK'S LAW DICTIONARY 1285 (5th ed. 1979) (sufficient cause to hold defendant to answer charges is reasonable or probable cause or that state of facts as would lead a man of ordinary caution to conscientiously entertain strong suspicion of defendant's guilt).
2. CAL. PENAL CODE §872(a); *see id* §859b. *See generally* B. WITKIN, CRIMINAL PROCEDURE *Proceedings Before Trial* §§132 (1963), 132A (Supp. 1978); 18 CAL. JUR. 3d *Criminal Law* §§534-546 (1975).
3. *See* CAL. EVID. CODE §1200(a) (definition of hearsay). *See generally* 31 CAL. JUR. 3d *Evidence* §§215-310 (1976).
4. CAL. PENAL CODE §872(b).
5. *See id.*
6. *Id.* (an eyewitness is defined as any person who sees the perpetrator during the commission of the crime charged, whether or not identification of the perpetrator can be made).
7. *Id.*

Chapter 1026 does not limit the right of the defendant to call and cross-examine any witness whose written statement was introduced as evidence regarding all matters asserted in the statement at the preliminary examination.[8] Furthermore, if the witness does not appear after reasonable efforts by the defendant to secure attendance, the court must grant a short continuance at the defendant's request and require the prosecuting attorney to present the witness for cross-examination.[9] If the prosecuting attorney fails to present the witness, the written statement will not be considered as evidence.[10]

8. *Id.* §872(c).
9. *Id.*
10. *Id.*

Criminal Procedure; final judgment—appeals

Penal Code §§1237, 1466 (amended).
AB 658 (Martinez); STATS. 1981, Ch 339
Opposition: Los Angeles Municipal Court Judges Association

Existing law allows a defendant, in both superior and inferior courts, to appeal from a final judgment of conviction.[1] Under prior law, the commitment of a defendant to detention for narcotics addiction[2] was considered to be a final judgment ninety days after the commitment.[3] The ninety day period allowed for the possible rejection of the commitment by the Director of Corrections,[4] and was to eliminate delay in review of the criminal judgment.[5] Chapter 339 eliminates the ninety day waiting period for final judgment[6] and deems a commitment for narcotic addiction an immediate final judgment for the purpose of appeal.[7]

1. *See* CAL. PENAL CODE §§1237(1), 1466(2); B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE *Appeal* §647 (1963).
2. *See* CAL. WELF. & INST. CODE §3051.
3. *See* CAL. STATS. 1968, c. 315, §§2, 3, at 685 (amending CAL. PENAL CODE §§1237, 1466).
4. *See* CAL. PENAL CODE §5053 (definition of Director of Corrections); B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE *Appeal* §647 (Supp. 1975).
5. *See* CAL. STATS. 1968, c. 315, §§2, 3, at 685. *See generally* People v. Gonzales, 68 Cal. 2d 467, 469-70, 67 Cal. Rptr. 551, 552-53 (1968). An addiction hearing is a civil proceeding distinct from a criminal prosecution. A defendant in a narcotics conviction may appeal the criminal trial and the commitment hearing.
6. *Compare* CAL. STATS. 1968, c. 315, §§2, 3, at 685 *with* CAL. PENAL CODE §§1237, 1466.
7. *See* CAL. PENAL CODE §§1237(1), 1466(2)(a).

Criminal Procedure; unlawful taking of merchandise or library materials

Penal Code §490.5 (amended).
AB 1678 (Young); STATS. 1981, Ch 650
Support: Department of Fair Employment and Housing
Opposition: National Organization for Women

Chapter 650 expands the authority of a merchant[1] or a library facility employee[2] who detains persons suspected of unlawfully removing or attempting to unlawfully remove merchandise[3] or library materials[4] from the premises.[5] In addition, Chapter 650 revises existing statutory provisions regarding defenses to civil actions of false arrest,[6] false imprisonment,[7] slander,[8] or unlawful detention arising from a detention or an arrest.[9]

A merchant or a library employee having probable cause[10] to believe a person is taking or attempting to take merchandise or library materials from the premises unlawfully is authorized by existing law to detain the person for a reasonable time and to examine any items in *plain view* to determine ownership.[11] In addition, existing law allows the merchant or library employee to use a reasonable amount of nondeadly force for protection and to prevent the escape of the person detained or the loss of the property.[12] A peace officer who accepts custody of a person arrested for unlawfully removing merchandise or library materials may search the person arrested and their immediate possessions for any item alleged to have been taken.[13] A merchant or library employee that detains persons pursuant to Chapter 650[14] may request the person detained to surrender the item voluntarily[15] and, if the person refuses, to conduct a reasonable and limited search.[16] The search is limited to packages, shopping bags, handbags, or other prop-

1. CAL. PENAL CODE §490.5(g)(2) (definition of merchant).
2. *Id.* §490.5(g)(4) (definition of library facility).
3. *Id.* §490.5(g)(1) (definition of merchandise).
4. *Id.* §490.5(g)(3) (definition of book or other library materials).
5. *Compare id.* §490.5 with CAL. STATS. 1980, c. 727, §1, at —.
6. CAL. PENAL CODE §834 (definition of arrest).
7. *Id.* §236 (definition of false imprisonment).
8. CAL. CIV. CODE §46 (definition of slander).
9. *Compare* CAL. PENAL CODE §490.5 *with* CAL. STATS. 1980, c. 727, §1, at —.
10. BLACK'S LAW DICTIONARY 1081 (5th ed. 1979) (definition of probable cause).
11. *See* CAL. PENAL CODE §490.5(e)(3).
12. *See id.* §490.5(e)(2).
13. *See id.* §490.5(e)(5).
14. *See id.* §490.5(e)(1).
15. *See id.* §490.5(e)(4).
16. *Id.*

erty in the immediate possession of the person detained;[17] the clothing of the person may not be searched.[18] In addition, Chapter 650 provides that upon the surrender or discovery of an item taken unlawfully, the person detained may be requested, but not required, to provide adequate proof of their identity.[19]

It is a defense to any action for false arrest, false imprisonment, slander, or unlawful detention brought by a person detained that the merchant or library employee had probable cause to believe the person had stolen or attempted to steal merchandise or library materials and that the merchant or library employee acted reasonably.[20] In *Cervantez v. J.C. Penney Co.*,[21] however, the California Supreme Court held that a merchant's defense of probable cause was valid in an action arising from a detention but not in an action arising from false arrest, the latter considered a greater intrusion.[22] Chapter 650 specifically extends this defense to any civil action brought against a merchant or library employee arising from a detention *or an arrest*.[23]

17. *Id.*
18. *Id.*
19. *Id. See also id.* §490.5(h) (requires a library facility to post at its entrance and exit conspicuous signs stating: "In order to prevent the theft of books and library materials, state law authorizes the detention for a reasonable period of any person using these facilities suspected of committing 'library theft' (Penal Code Section 490.5))."
20. *Compare* CAL. PENAL CODE §490.5(e)(6) *with* CAL. STATS. 1980, c. 727, §1, at —.
21. Cervantez v. J.C. Penney Co., 24 Cal. 3d 579, 595 P.2d 975, 156 Cal. Rptr. 198 (1979).
22. *Id.* at 589-91, 595 P.2d at 981-82, 156 Cal. Rptr. at 204-05.
23. CAL. PENAL CODE §490.5(e)(6).